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IN THE

Supreme Court of the United States

No._____

JACK WAYNE LYLES, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals For the Fifth Circuit

Petitioner Jack Wayne Lyles prays that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit entered December 10, 1957, said opinion and judgment affirming Petitioner's conviction in the District Court of the United States for the Southern District of Texas for interstate transportation of stolen money.

Opinions Below

The opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 16735 entitled "*Jack Wayne Lyles v. United States of America*" is appended to this petition.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered December 10, 1957.

Petition for Rehearing filed by Petitioner in the Court of Appeals was denied January 30, 1958. On February 19, 1958, the Court of Appeals entered its Order staying its mandate for a period of thirty (30) days from January 30, 1958, and until final disposition of the case by the Supreme Court provided that within thirty (30) days from January 30, 1958, there should be filed with the Clerk of the Court of Appeals the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed.

The statutory provision which, it is believed, confers on the Supreme Court jurisdiction to review the judgment in question by Writ of Certiorari is Section 1254(1) of Title 28, of the *United States Code* (45 Stat. 54), which reads as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Questions Presented For Review

1. The propriety of the Trial Court's charge to the jury on accomplice testimony. The Trial Court charged the jury that it might find corroboration in other facts in the case; no possible corroboration exists in the other evidence; the Court of Appeals held that it was unneces-

sary for the Trial Court to charge the jury on the weight of accomplice testimony, and that accordingly no error was presented. This, it is contended, was error.

2. The sufficiency of the evidence to sustain a conviction.

   (a) The conviction here rests solely upon what this Court has termed "tainted testimony" wholly uncorroborated in any essential element of the offense; and

   (b) The prosecution has failed to offer evidence available to it and material to the issues presented, thereby raising an inference favorable to Petitioner.

Statute Involved

The Statute under which Petitioner was tried and convicted is Article 2314, Title 18, (63 Stat. 96), *United States Code,* which reads as follows:

> "2314. Transportation of stolen goods, securities, monies, or articles used in counterfeiting
>
> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered, or counterfeited; or
>
> Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country. As amended May 24, 1949, c. 139, Sec. 45, 63 Stat. 96."

Statement of the Case

Petitioner was tried on a single count indictment charging that on or about August 29, 1955, he did knowingly and unlawfully transport in interstate commerce from New Orleans, Louisiana, to Houston, Texas, approximately $22,000.00 in United States currency, knowing the same to have been stolen. He was found guilty by a jury and sentenced to serve eight years in the custody of the Attorney General.

The Government offered the testimony of two witnesses —Evelyn McCarthy and Doris Andrews (also called Doris Andrews Grouches), who testified, in substance, as follows: In August, 1955, Evelyn McCarthy, a prostitute, met one Hill, in the pursuit of her profession, and while consorting with him, discovered that he had with him a great deal of money. Evelyn McCarthy so advised her husband, Ralph McCarthy, Petitioner Jack Wayne Lyles, and Doris Andrews, and the four of them embarked upon a common scheme to rob Hill of his money. Evelyn McCarthy rejoined Hill at the Rice Hotel in Houston, where later in the afternoon she and Hill decided to go to Baton Rouge, Louisiana. Upon arrival at the airport,

however, their destination was changed to New Orleans. Petitioner, Ralph McCarthy, and Doris Andrews followed them to the airport, learned that they had changed their destination to New Orleans, followed them to New Orleans, discovered the location of the hotel where Evelyn McCarthy and Hill had checked in, and going to the hotel, entered the room at gun point and relieved Hill of approximately $22,000.00 in United States currency, which money the four participants then carried back to Houston, Texas.

The Government also offered the testimony of an Assistant Cashier of the Inland Empire Bank in Umatilla, Oregon, to the effect that approximately one week before, the bank had been robbed by two persons of over $57,000.00; this witness identified a person produced by the Government in open court as one of the bank robbers and the persons so identified was identified by witnesses Evelyn McCarthy and Doris Andrews as the person Hill, who was allegedly robbed of the $22,000.00 by Petitioner and his companions.

Bell boys at the Rice Hotel in Houston, Texas, identified Hill as the person who was present, checked in at the Rice Hotel, and identified Evelyn McCarthy as a woman who was with him.

Bell boys at the St. Francis Hotel in New Orleans identified Hill as a guest of the hotel, although these bell boys did not identify either Evelyn McCarthy, Doris Andrews or Petitioner Jack Wayne Lyles.

The balance of the Government's testimony was concerned with proof that on September 1, 1955, Petitioner purchased a used Cadillac automobile for the sum of $2,650.00, of which sum $2,300.00 was paid in cash,

That on August 6, 1955, an automobile in the name of Petitioner was repossessed by a finance company by reason of the fact that the payments on the car were delinquent, that on August 30, 1955, Petitioner deposited $1,000.00 in his account, which prior to that time was in the sum of 40¢, and that on the same date a safety deposit box was rented in the name of Petitioner; that on August 30, 1955, Petitioner paid credit accounts totalling $303.55; and that on September 1, 1955, Petitioner purchased $378.20 in men's clothing.

Neither of the women accomplice witnesses was ever arrested or prosecuted for the crime charged against Petitioner. The alleged fourth member of the group, Ralph McCarthy, was killed in an automobile accident some four months before the institution of the criminal action against Petitioner. Upon cross-examination of the two women accomplices, it was developed that the witness Evelyn McCarthy, shortly after the alleged robbery of Hill, together with her husband, purchased a new home in which she still resided, and, further, that since the institution of the proceedings against Lyles, several criminal prosecutions pending against Evelyn McCarthy had either been dismissed or not brought to trial. The witness Doris Andrews had earlier given to Petitioner's attorney a statement, in the presence of her own attorney, and immediately upon her release from custody after she had been arrested by the FBI as a material witness, knowing such statement was in connection with said attorney's representation of Petitioner in this case, which on the trial she testified was pure fiction and was a deliberate falsehood not induced by either Petitioner's attorney or her own attorney, whom she desired to be present during the interview. She admitted that she had collaborated with newspaper reporters in

writing a lurid story of her life since the institution of the criminal proceedings against Petitioner.

On conclusion of the evidence, the Court charged the jury on accomplice testimony, and part of the Court's charge is as follows:

> "Now, under the law, the federal rule is that a conviction may be had upon the testimony of an accomplice alone. In other words, it is not essential that the testimony of an accomplice be corroborated, but you do have the right to consider whether or not there is corroboration. If there exists a question in your mind as to whether full effect should be given to the statements of such a witness, then you are entitled to refer to the whole case, the whole circumstances, as to whether or not the witness is corroborated by other evidence which is not so affected, by undisputed facts or circumstances which are presented in the case. If you find such corroboration in the case as a whole, then it is your right and your duty to give effect to that corroborative evidence in connection with the weight which you shall give to the testimony of such witness.
>
> ". . .
>
> "By the term 'corroboration' as I have used it is meant some fact or facts which connect the accused with the act or guilt. There may be a fact or facts in evidence which support the story related by Evelyn McCarthy and Doris Andrews Grouches, but which do not identify and connect the accused with the crime charged. You are instructed that unless you have a full and positive conviction that Evelyn McCarthy and Doris Andrews Grouches are telling the truth, you should disregard their testimony. However, it is entirely up to you whether you believe them or not." (R. 270-271, 272)

Argument

It is respectfully submitted that the Court of Appeals for the Fifth Circuit has decided an important question of Federal law, which has not been but which should be settled by this Court or, alternatively, has decided such Federal question in a way in conflict with applicable decisions of this Court regarding the same subject matter, and in its decision has so far departed from the accepted and usual course of judicial proceedings by sanctioning such departure by the Trial Court as to call for an exercise of this Court's power of supervision and a statement of the proper application of the law.

What is here involved is the Constitutional right of a defendant charged with crime to a fair trial. This Court must know of the resort by the Government prosecutors in ever increasing instances to seek convictions by reliance upon the testimony of admitted co-patricipators in the crime charged. While it is commendable that a criminal make a clean breast of his misdeeds, whenever such a person is given not only his freedom from chastisement for his misconduct, but left unmolested to enjoy the fruits of his crime, all for the sake of his testimony against another, the door is opened wide to grave injustice. Because the prosecution in order to prove its case, must often resort to such testimony, the law should afford a defendant some protection against abuse of the practice. One such protection is the charge of the court, impartial and aloof from the heated partisan arguments of counsel, advising the jury that while the jury might accept such testimony and convict thereon, nevertheless it is suspect, should be weighed with caution and undue credence should not be placed on it if not corroborated. Another protection is the refusal by courts to

permit the Government prosecutors to sully the dignity of the United States by reliance for conviction upon the sworn word of demonstrated liars. Both of these contentions have been rejected by the Court of Appeals.

Further, the Court of Appeals has here bolstered a growing trend of Courts of Appeals' opinions which uniformly cite two opinions of this Court as authority for a proposition which is an effrontery to the true expression of the Supreme Court. These cases are *Holmgren v. U. S.*, 217 U.S. 509, 30 S. Ct. 588, 54 L. Ed. 861, and *Caminetti v. U. S.*, 242 U.S. 470, 37 S. Ct. 192, 61 L. Ed. 442.

In *Holmgren v. U. S.* (supra) this Court refused to reverse a conviction because of the failure of the trial court to charge the jury on the weight to be given the testimony of an accomplice witness. On this point the Court held:

> "Be that as it may, the request did not properly state the law; as it assumed that Werta was an accomplice, —a conclusion which was controverted, and against which the jury might have found in the light of the testimony. It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them."

It seems clear that the Court did not question the correctness of the law as contended but only the propriety of the charge requested.

In *Caminetti v. U. S.* (supra), this Court cited the *Holmgren* case and announced further that while the practice of charging the jury on accomplice testimony was desirable, no rule of law forbade convictions on accomplice testimony if believed by the jury. This holding of the Court

was likewise only that a refusal to charge in the forum requested was correct, because the requested charge improperly assumed that the witnesses were accomplices.

These two cases would seem to leave the status of the law as follows: When the prosecution relies on accomplice testimony, the Court should warn the jury against too much reliance on such testimony and that the jury should require corroborating testimony before giving credence to accomplice testimony, but that if the jury were convinced by the evidence beyond a reasonable doubt, it might convict on accomplice testimony even though uncorroborated.

The opinion of the Court of Appeals in this case has abbreviated this doctrine at the expense of rights of the accused to have the jury warned, and it is now authority for the proposition that a refusal to instruct as to the value of accomplice testimony is not error requiring reversal. By this opinion does the Court of Appeals do away with a valuable protection of an accused against a possible and likely injustice that can result when the Government prosecutors protect one lawbreaker at the expense of the person on trial.

Further, the Court of Appeals has refused to dispose of Petitioner's contention that not only was the jury not properly charged, it was misdirected by the charge. The Trial Court told the jury that it might look to other facts in evidence to see whether the witnesses were corroborated and if the jury found such corroboration then it was the jury's duty to give effect to such corroboration in weighing the accomplice testimony. There is not one shred of evidence, not even a scintilla of proof in the body of the evidence which could possibly constitute corroboration of

these women. The only evidence on which the Government relies, that is, proof that a bank was robbed by Hill, that Hill was in the Rice Hotel in Houston, that Hill was in the hotel in New Orleans, and that a few days after the alleged robbery Petitioner was in possession of somewhere between $3300.00 and $3981.75 in cash, it is not *corroborative* of the accomplice testimony, but is merely *consistent* with it. Corroboration has always been taken by the courts as meaning fact or facts which tend to identify the accused and connect him with the act of guilt. *Arnold v. U. S.*, 94 F. 2d 499; *Sykes v. U. S.*, 204 F. 2d 909; *Wharton on Criminal Evidence*, 9th Ed., Sec. 442. And if two or more accomplices are produced as witnesses, they are not deemed to corroborate each other, but the same corroboration is required as if there were but one. *U. S. v. Hinz*, 35 F. 272.

These propositions on corroboration have not been disputed by the Government on appeal in this case, but are submitted to demonstrate the problem here presented. For the Court to permit the jury to speculate on whether the other evidence was corroborative, is to attach to such other evidence a significance greater than that to which it is entitled, and for the Court, by its charge, to even infer that the accomplices might be corroborated, is to bolster their testimony rather than to call the jury's attention to its obvious unreliability.

This is not consistent with the demands of justice and the purpose of the Court's charge to the jury.

In this case the conviction depends upon the testimony of witnesses whose testimony is tainted. It was demonstrated on the trial that the witness Evelyn McCarthy was ob-

viously motivated by a hope of immunity, which was certainly justified by her admitted hatred of Petitioner and by a desire to be able to enjoy the fruits of her own crime unmolested by society in any demand that she make retribution of the stolen money; in this latter connection the conclusion is inescapable from the evidence that this woman and her husband purchased a suburban home within six weeks of the alleged offense with their share of the booty, and this woman even today lives there enjoying the benefits of her crime for which Petitioner was convicted. The witness Doris Andrews was likewise motivated by a like hope of immunity, possible fear as a result of pressure exerted on her by FBI agents, admitted hatred for the Petitioner, and by a desire to parade herself before society as spectacularly and in as lurid a manner as she could contrive. Shortly after the trial there appeared in a national magazine, being "True Police Cases", July issue, Volume 9, No. 101, published monthly by Fawcett Publications, Inc. of Greenwich, Connecticut, and entered as second-class matter in the Post Office, an article entitled "I was born to do wrong!" by Doris Andrews. The article was accompanied by eight photographs of the author, showing her in jail, in provocative poses, in bars with men, and under other circumstances, and dwells at length upon every sordid, immoral and filthy exploit of which the human mind is capable when degeneracy runs rampant. Reprinted as a part of the appendix hereto is a portion of the article dealing with her description of the transaction in question. In at least fifteen instances, shown in italics in the reprinted excerpt, the witness has testified at a very substantial and material variance with the testimony given by her on direct examination during the trial, and certainly at extreme odds with the statement given by her voluntarily and without

duress to Petitioner's attorney before the trial. Her testimony is her third version of the affair and the only one which is consistent with the testimony of her co-accomplice.

It is submitted that this type of evidence is the type of evidence which the dignity of the United States cannot abide. The language of *Mesarosh v. U. S.*, 1 L. Ed. 2d 1, 352 U.S.—, 77 S. Ct. 8, in reversing a conviction based upon the testimony of a witness, who had testified falsely on the same matters in other proceedings, is deemed apropos:

> "The question of whether his untruthfulness in these other proceedings constitutes perjury or was caused by a psychiatric condition can make no material difference here. . . . The dignity of the United States Government will not permit the conviction of any person on tainted testimony. . . . The Government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them."

The true weakness of the prosecution's case is revealed not only in what has been offered and produced, but in that evidence which was not offered or produced. Particularly, the Court's attention is directed to the fact that the witness Jack Hill, the man who robbed the Inland Empire Bank of over $50,000.00, who was identified by various bell boys as the person whom the accomplices said was robbed of $22,000.00, who has been convicted of the bank robbery and is in Federal custody and was present and produced by the Government for identification on the trial, was never called by the Government as a witness. The fact that he was even robbed at all must rest again on the uncorroborated testimony of the accomplices, Evelyn McCarthy and Doris Andrews, for he has never so testified.

The failure of the prosecution to produce a witness, which it was its duty to produce, without explanation, supports the inference that the witness' testimony, if he had been called, would have been unfavorable. 22 *Corpus Juris Secundum* 912 (Criminal Law, Section 594).

The application of this rule to the facts before this Court is appropriate. Its effect is that it must be presumed that had Hill been called by the Government as a witness, his testimony, had he testified that he had been robbed, would be that he was not robbed by the Petitioner Jack Wayne Lyles.

The rule is again stated in *Wharton on Criminal Evidence*, Eleventh Edition, Section 112:

> "It is incumbent upon the State to produce evidence would naturally be produced in an honest effort to support the charge in an indictment, and the non-production of such evidence permits the inference that if it had been produced, its tenor would have been unfavorable to the prosecution. The fact that the prosecuting attorney fails to examine witnesses who are cognizant of the material facts and presumably available at the trial, permits an inference of fact favorable to the defendant."

The Government, under its burden of proving Petitioner guilty beyond a reasonable doubt, offering only the testimony of accomplices uncorroborated in the slightest, should have called Jack Hill as a witness. An honest effort to support the charge required his production. Having been convicted and sentenced to Federal custody, his testimony could not incriminate him. Though a felon, his testimony would not be that of an accomplice, and, if favorable to

the Government, would have operated to strongly corroborate the accomplices, not only that the crime occurred, but also that Petitioner participated therein. This man, who had been convicted of a Federal offense carrying a heavy penalty, now serving his time, who had been robbed at gun-point of the loot of his robbery, were he actuated by any motive, purpose or desire in his testimony, would have testified for revenge against the man who, as it were, had added insult to injury. Hill would have identified Petitioner for a certainty, *assuming his guilt.* The Government having failed to call him, the law presumes that the tenor of his testimony would have been favorable to the Petitioner, and that either he was not robbed and no offense occurred, or that if he was robbed, it was by person or persons other than Petitioner.

It is not believed presumptuous to ask this Court to judicially recognize the high degree of efficiency, in the conduct of its investigations, achieved by the Federal Bureau of Investigation. This corps of fine, highly-trained, patriotic Americans, with every scientific assistance to the conduct of their investigations and the apprehension of law violators, has achieved such significant results and so often has accomplished the near miraculous, as to have excited the imagination and to have earned for them the respect of us all. It is common knowledge that these investigators will leave no stone unturned in the gathering of evidence. If this be true, then from the evidence we must conclude that these able investigators were either unable to unearth any evidence or else that such information as was unearthed was discarded as of no assistance in the prosecution. This case is devoid of any evidence that must have been available to trained investigators, such evi-

dence as may have been obtained from the representatives of Eastern Air Lines, who may have confirmed that Evelyn McCarthy and Hill missed a flight to Lake Charles and instead left for New Orleans, that Petitioner and his alleged co-participators determined from such airlines the destination of Evelyn McCarthy and Hill. The record is devoid of any testimony on the part of any employees of airlines or other persons who may have been in the terminal at New Orleans when Evelyn McCarthy lost her purse and searched the airplane and the terminal building. The evidence is devoid of the testimony of the cab dispatcher who may have confirmed that Petitioner and his co-participators learned of the destination of Evelyn McCarthy and Hill from the cab driver and the cab dispatcher. The evidence is devoid of any testimony of hotel employees or other persons who may have been able to identify Petitioner, Ralph McCarthy or Doris Andrews in the Hotel St. Francis in New Orleans. The record is devoid of any testimony or other evidence reflecting cross-country cab trips; surely it must be so unusual in the experience of the operators of taxicabs, that when four people take a cab cross-country from New Orleans, Louisiana, to Houston, Texas, that fact would have lasting register on the memory of the cab driver. The record is devoid of the testimony of the custodian of Safety Deposit Boxes at the South Main State Bank, who is still employed there, who may have been able to testify to conversations with Petitioner and who might have been able to testify as to what was placed in or taken out of the box in question; no showing of the contents of the box is made though such was possible under subpoena, *and this box had not been entered since September 23, 1955*, over 15 months before Petitioner was indicted. Can it be presumed that the FBI,

in the conduct of its investigations, failed to seek this evidence which is significant by its absence? The contrary is more consistent with our conception of the Government's resources and abilities.

Because the Government has been unable to corroborate the fantastic story related by its witnesses Evelyn McCarthy and Doris Andrews, and because so many opportunities to corroborate that story are afforded by the very nature of this incredible tale, it is respectfully submitted that this is perhaps the most significant circumstance of all that appears from the evidence. It is urged that this circumstance, if nothing more, would leave the state of the evidence such that it is equally consistent with the Petitioner's innocence as it is with his guilt. In such a case no conviction can be had. *Dahly v. U. S.* (8th Cir., 1931), 50 F. 2d 347.

This case represents an appalling example of what can happen when all is cast aside for the sake of securing a conviction, when the Government prosecutors will rely on the established prestige and respect which Government officials have earned for themselves, to carry their burden of proof, when a jury is asked to believe people who are unworthy of belief and who tell a fantastic story, asked to believe them merely because the Government vouches for their credibility. The Court of Appeals has sanctioned this conviction, and the only hope for restraint of this unjust practice rests with this Court.

For the reasons assigned, it is respectfully urged that this Court issue its Writ of Certiorari to review the decision of the Court of Appeals for the Fifth Circuit in this case, and upon such review that Petitioner's conviction be set

aside and such further proceedings be ordered as may be consistent with the ends and demands of justice.

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I certify that a true complete printed copy of the foregoing Petition for Writ of Certiorari was mailed to William B. Butler, United States Attorney, Att.: Gordon J. Kroll, Assistant United States Attorney, 205 Post Office Building, Houston 2, Texas, on this the ____ day of February, 1958.

WILLIAM H. SCOTT, JR.

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 16735

JACK WAYNE LYLES, *Appellant*,
versus
UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the Southern District of Texas

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(December 10, 1957.)

Before HUTCHESON, Chief Judge, and RIVES and JONES, Circuit Judges.

PER CURIAM: Charged in a one count indictment with transporting in interstate commerce, in violation of Sec. 2314, Title 18, U.S.C., $22,000 in United States currency, knowing it had been stolen, defendant was convicted on evidence consisting in large part of the testimony of two women accomplices.

Appealing from the judgment and sentence, defendant is here, under five specifications of error, insisting in effect (1) that because, as he claims, there was no corroboration of the accomplice testimony, a judgment of acquittal should have been, and should be, directed, and (2) that, if not, the case was submitted on improper or inadequate instructions on the matter of corroboration, and the judgment should be reversed because of errors of commission and omission in the charge in respect of corroboration.

Briefly summarized, the four errors claimed under No. 2 above are: (1) the charge to the jury that it could consider whether there was corroboration of the accomplice testimony; (2) the failure of the court to instruct the jury, at defendant's request, that the testimony of the accomplice was uncorroborated as matter of law; (3) its failure to charge that the testimony of one accomplice could not corroborate the testimony of the other; and (4) the failure to give in charge to the jury defendant's requested charge No. 2, that too much reliance should not be placed on the accomplice testimony unless the jury found it to be corroborated by other evidence connecting the defendant with the act of guilt.

On its part, appellee invokes the established rule in the federal courts that it is not for the judge but for the jury to say whether the testimony of witnesses is entitled to credence and should be believed, *Beland v. U. S.*, 100 F(2) 289, *Banks v. U. S.*, 147 F(2) 628, and that "while received with caution and weighed with great care, uncorroborated testimony of an accomplice is to be accorded whatever credence the trier of fact may think it deserves." *Doherty v. U. S.*, 230 F(2) 605. Cit-

ing the uniform holding of the federal courts, that it is not necessary to a conviction on the testimony of an accomplice that the testimony be corroborated and that a refusal to instruct as to the value of the testimony of an accomplice is not error for which a judgment should be reversed; *Diggs v. U. S.*, 220 Fed. 545; affirmed 242 U.S. 470; and reaffirmed in *Pina v. United States*, 165 F(2) 891; it insists that, in the light of the evidence in the case and of the court's careful and painstaking charge, particularly with respect to accomplice testimony, defendant's appeal is completely without substance, indeed frivolous. We agree.

The basic fallacy of defendant's contentions as to the necessity of corroboration, and particularly of his reliance upon the dictum in *Holmgren v. United States*, 217 U.S. at page 524, as requiring such a charge to be given upon pain of reversal if it is not, is completely exposed and swept away in Judge Garrecht's opinion in the Pina case, supra. Because it is, we will attempt no labored argument here. Saying only that the evidence was not only sufficient to take the case to the jury, but that, considered as a whole, it was credible and convincing and that the charge of the court on accomplice testimony was completely, indeed more than, fair to defendant, we will content ourselves with the statement of the law as that opinion sets it forth:

> "This court has held that refusal to give an instruction regarding the credibility of an accomplice is not reversible error. In Diggs v. United States, 9 Cir., 220 Fed. 545, 552, 553, Judge Gilbert said:

'First. A refusal to instruct as to the value of the testimony of an accomplice is not error for which a judgment should be reversed. * * * and it is believed that no court, state or federal, has held that it is reversible error to refuse to caution the jury to scrutinize with care the testimony of an accomplice. * * *

'In the present case the court instructed the jury that the evidence must be such as to satisfy their minds beyond a reasonable doubt and to a moral certainty, and said that they should take into consideration the character and conduct of each witness, his relation to the controversy and to the parties, his expressed or apparent bias or partiality, the reasonableness or unreasonableness of the statements he makes, and all other elements which tend to throw light upon his credibility.'

"In affirming the judgment of this court in the Diggs case, supra, the Supreme Court, in 242 U.S. 470, 495, 37 S. Ct. 192, 198, 61 L. Ed. 442, L.R.A. 191 F 502, Ann. Cas. 1917B, 1168, used the following language: 'It is urged as a further ground of reversal of the judgments below that the trial court did not instruct the jury that the testimony of the two girls was that of accomplices, and to be received with great caution and believed only when corroborated by other testimony adduced in the case. We agree with the circuit court of appeals that the requests in the form made should not have been given.

In Holmgren v. United States, 217 U.S. 509, 30 S. Ct., 588, 54 L.Ed. 861, 19 Ann. Cas. 778, this court refused to reverse a judgment for failure to give an instruction of this general character, while saying that it was the *better practice* for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to such evidence. *While this is so, there is no absolute rule of law preventing convictions on the testimony of* accomplices if juries believe them.' (Authorities cited) (Emphasis supplied)

"This doctrine has been followed in other circuits. Referring to the caution against the testimony of accomplices, Judge Learned Hand, in United States v. Becker, 2 Cir., 62 F(2) 1007, 1009, said: 'The warning is never an absolute necessity. It is usually desirable to give it; in close cases it may turn the scale; but it is at most merely a part of the general conduct of the trial, over which the judge's powers are discretionary, like his control over cross-examination, or his comments on the evidence. If he thinks it unnecessary—at least when, as here, the guilt is plain—he may properly refuse to give it. Such we understand to be the upshot of the decisions. (Many cases cited)'

"The same rule has been adopted 'even in cases where the confederate appears for the prosecution motivated by hope of immunity.' Weaver v. United States, 8 Cir., 111 F(2) 603, 608. Cf. Wellman v. U. S., 6 Cir., 297 F. 925, 933, 934."

We add only particular reference to *Stoneking v. United States*, 8 Cir., 232 F(2) 385, at p. 391; *United States v. Bucur*, 7th Cir., 194 F(2) 297, at p. 305; *Haakinson v. United States*, 8 Cir., 238 F(2) at p. 779; *Gormley v. United States*, 4th Cir., 167 F(2) 454, at p. 457; *McClanahan v. United States*, 5th Cir., 230 F(2) at p. 292; and that a thorough examination of the citations in Shephard's Notes to the Holmgren case and the multitude of cases citing the Diggs case, show not a single divergence from the rule of the latter case, nor any case where a reversal was ordered for the failure to give the so-called Holmgren charge.

The judgment is AFFIRMED.

APPENDIX B

Excerpt from Magazine Article "I was born to do wrong!" by Doris Andrews ("True Police Cases" July issue, Vol. 9, No. 101). Italicized matter is that which contradicts her testimony on direct examination.

"One night Eve (intending Evelyn McCarthy) went out on a $150 date. She came back as excited as a cat in a catnip bed and threw $1,200 down on the table.

'Look at this!' she exclaimed, picking up a $100 bill with one end charred.

'That jerk I was with has a duffel bag full of money', Eve chattered. 'He lights cigarets with $100 bills!'

Ralph (intending Ralph McCarthy) and Pete (whom on the trial the authoress identified as the petitioner, Jack Wayne Lyles) jumped up and looked at the money. Their eyes were shining.

'How much you figure he has, doll?' Ralph asked.

'I don't know', replied Eve. '*But he wants me to go to New Orleans with him.*'

'New Orleans!' Pete shouted. 'Well, go to New Orleans with him. We'll be along later.'

Pete and Ralph worked it out with Eve, ignoring me. I'm glad they did. *Eve was to go to New Orleans with the mark and register at a certain hotel.* She was to make sure that the mark—and his money—were in the room at a certain hour on a certain day. The rest Pete and Ralph would take care of.

'Don't worry', smiled Eve, twisting a hip. 'He'll be in the room—in bed!'

She packed a bag and left hurriedly. *Ralph and Pete and I went the next day, after Pete had made some inquiries via the grapevine.*

'This is a cinch', Pete laughed. 'The guy is a bank heister. The money is his share of the loot from his last job. I don't think he'll squawk to the cops, do you?

Ralph laughed. It did look airtight.

In New Orleans, we drove directly to the hotel where Eve and the bank robber were registered. Ralph and Pete left me at the elevator and walked around the corner to the room. Eve told me later what happened.

Two minutes later, Ralph, Pete and Eve came hurrying to the elevator. Pete was lugging a canvas bag. I learned later that there was just under $25,000 in the bag.

We went to Dallas. I wanted to get loose, but Pete had taken a liking to me, and made me stay with him. *In Dallas, he bought me $2000.00 worth of clothes.* Then we headed for Las Vegas.

From Vegas, we went to Albuquerque, New Mexico.

Pete was crazy about horse racing. *In Albuquerque, he bought some thoroughbreds, I don't know how many, and a flashy Lincoln.* One day, however, he left town, telling us to take a plane and join him in Houston.

We did, but when I got back to my home town, I decided that I'd had enough of that crowd. I walked out on them.

The next I heard about the trio, they were in a jam. For the FBI had nabbed the bank bandit whose loot Pete and Ralph had hijacked. Pete had been wrong

about him squawking. The bandit had spilled his guts to the G-Men, and since Eve had given the guy her real name, it wasn't hard for the Feds to trace the people who had robbed the robber.

They were too slow for Ralph, however. He was killed in an automobile accident. Meanwhile, Eve was picked up, and she made a written statement. On the basis of that statement, the FBI arrested Pete a few months ago and charged him with interstate transportation of stolen money.

They came after me, too. I was working in a variety store when they walked in and identified themselves. I went to the FBI offices and corroborated Eve's statement, but I wouldn't give them one of my own. *And I told them I wouldn't testify, either. For I didn't actually see the men rob the bank bandit. I couldn't identify him as the victim, and I never saw any of the money.*

A few days later, pilled up and wild, I was arrested and given (60) days for possession of barbiturates."

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 820

JOHN WAYNE LYLES, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A) is reported at 249 F. 2d 744.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1957. A petition for rehearing was denied on January 30, 1958. The petition for a writ of certiorari was filed on February 28, 1958. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly instructed the jury as to accomplice testimony.

2. Whether the failure of the government to call a witness available to both sides raised an inference unfavorable to the government which vitiates the conviction.

STATUTE INVOLVED

18 U.S.C. 2314 provides in pertinent part:

> Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; * * *
>
> * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

STATEMENT

On May 10, 1957, in the United States District Court for the Southern District of Texas, petitioner was convicted of transporting in interstate commerce from New Orleans, Louisiana, to Houston, Texas, $22,000.00 in United States currency, knowing it to have been stolen, in violation of 18 U.S.C. 2314 (R. 6, 302, 303). Petitioner was sentenced to 8 years imprisonment (R. 303). On appeal his conviction was affirmed (Pet. 19-24).

The evidence showed that, in 1955, Evelyn McCarthy, a prostitute, was living in Houston, Texas, with her husband, Doris Andrews and the petitioner (R. 48, 50, 51, 60, 61). In August 1955, Mrs. McCarthy met a man named Peterson and spent the

night with him at the Rice Hotel in Houston, Texas (R. 50). Peterson was identified by an Assistant Cashier of the Inland Empire Bank in Umatilla, Oregon, as Jack Hill, one of the men who robbed the bank of $57,000 on August 22, 1955 (R. 25-57).

While spending the night with Hill, Mrs. McCarthy discovered that he was carrying a large sum of money in a zipper bag (R. 52). The next morning when she reported this to her husband he told her to return to the hotel and get some more money. She rejoined Hill at the Rice Hotel (R. 66). Ralph McCarthy and petitioner sent Doris Andrews (now Doris Andrews Grouches) to the hotel room to find out what Mrs. McCarthy "was doing, and how long she was going to be up there" (R. 112). She learned that Mrs. McCarthy and Jack Hill were planning to go to Lake Charles, Louisiana, that same day (R. 67, 69, 70, 114). Doris Andrews joined petitioner and Ralph McCarthy who were waiting for her and they all went back to Ralph's home to await an expected telephone call from Mrs. McCarthy (R. 115, 116).

Shortly after Doris Andrews left the hotel, Mrs. McCarthy and Jack Hill took a taxi to the airport (R. 50). They discovered that they had missed the plane for Lake Charles, Louisiana, and instead took a plane to New Orleans, Louisiana (R. 50, 51). Shortly after checking in at a New Orleans hotel, Hill and Mrs. McCarthy heard a knock at the door. When Hill answered, the petitioner, Doris Andrews, and Ralph McCarthy came into the room in "kind of a rush" (R. 55, 56). The testimony revealed that, after waiting at the McCarthy home for Mrs. McCarthy to telephone, petitioner, Ralph McCarthy and

Doris Andrews decided to go "uptown to see what had happened" (R. 116). On learning that Hill and Mrs. McCarthy had gone to New Orleans the three flew immediately to New Orleans (R. 117, 118). In a conversation with a taxi cab driver in New Orleans they discovered the hotel at which Hill and Mrs. McCarthy were staying and checked in at the same hotel (R. 118, 119). After petitioner and Ralph McCarthy "messed up the covers" in their room and posted Doris Andrews as a lookout at the elevator, they gained entry to the room in which Hill and Mrs. McCarthy were staying (R. 120, 121). The three intruders (Doris Andrews entered once the door was open) forced Hill to lie down on the floor and covered his head with a pillow (R. 56). After locating the zipper bag containing the money, the three and Mrs. McCarthy left the hotel with the zipper bag (R. 57, 122, 123). All four returned to Houston by cab. In the McCarthy house in Houston petitioner and Ralph McCarthy counted and divided the money (R. 58, 123). Petitioner and Ralph McCarthy then burned the zipper bag that had held the money and also the dress that Mrs. McCarthy had worn that day (R. 124).

The two women involved in the venture were the principal government witnesses. In addition a bell hop at the Rice Hotel testified that he saw Hill (known to him as Peterson) and Mrs. McCarthy together at the hotel and at the request of Hill purchased a zipper bag for him and made plane reservations from Houston to Lake Charles (R. 29-32). He saw Doris Andrews in Hill's room shortly before 2 o'clock (R. 33, 43). A few days after Hill and Mrs.

McCarthy left, supposedly for Lake Charles, he saw Hill standing in front of a bus station in New Orleans (R. 35). A bell hop at the St. Francis hotel in New Orleans testified that Peterson and a lady checked into the hotel on a Sunday afternoon in August (R. 109). Additional witnesses called by the prosecution showed that immediately prior to the date of the crime the petitioner was indebted to numerous firms and that immediately after the date of the crime he paid his large bills ($303.55); bought a Cadillac for $2,650.00, of which sum $2,300.00 was paid in cash; deposited $1,000 in his banking account; purchased $378.20 in men's clothing; and went on a trip to Las Vegas (R. 127, 177, 178, 187, 194, 201, 208, 213, 218).

ARGUMENT

1. Petitioner contends that the court's charge failed properly to instruct as to the value of accomplice testimony and misdirected the jury because it permitted the jury to determine whether the accomplice testimony was corroborated, thus attaching to the other evidence in the case a significance greater than that to which it was entitled (Pet. 10, 11). As to the care with which accomplice testimony should be viewed, the court charged (R. 268, 269, 270, 271):

> * * * You are instructed that you may convict upon the testimony of an accomplice, but the testimony of an accomplice should be received with caution and scrutinized with care.
>
> * * * *

> Where an accomplice is a witness in the case, his testimony is subject to careful scrutiny. It should be carefully weighed to ascertain whether or not such a witness has a motive or interest in telling anything othe[r] than the truth. * * *
>
> * * * *
>
> * * * But I repeat that the testimony of an accomplice should not be received by the jury as that of an ordinary witness but ought to be received with suspicion and with the greatest of care and caution, to the end that no injustice may be caused in the acceptance of this testimony.

As to corroboration, the court said:

> Now, under the law, the federal rule is that a conviction may be had upon the testimony of an accomplice alone. In other words, it is not essential that the testimony of an accomplice be corroborated, but you do have the right to consider whether or not there is corroboration. If there exists a question in your mind to whether full effect should be given to the statements of such a witness, then you are entitled to refer to the whole case, the whole circumstances, as to whether or not the witness is corroborated by other evidence which is not so affected, by undisputed facts or circumstances which are presented in the case. If you find such corroboration in the case as a whole, then it is your right and your duty to give effect to that corroborative evidence in connection with the weight which you shall give to the testimony of such witness.

The first part of the charge shows that, contrary to petitioner's contentions, the court did charge

the jury on the value of accomplice testimony with perhaps more stress on the need for caution than the cases require.

The remainder of the charge, as quoted, merely advises the jury that they *may* find corroboration in other testimony if they believed it existed. Whether corroboration exists is a question properly left to the jury. See *Bennett* v. *United States*, 227 U. S. 333; *Brickey* v. *United States*, 123 F. 2d 341 (C.A. 8).

2. Jack Hill, petitioner's victim, was brought by the government from Atlanta on a writ of habeas corpus ad testificandum but was not called by the government. Petitioner argues that the failure to call Hill raises an inference unfavorable to the government which serves to render the entire testimony in the case as equally consistent with innocence as with guilt. Hill's testimony that he had been robbed would, at most, have been cumulative of the testimony of the persons who testified that they participated in the robbery, and the government was therefore not under a duty to call him. See *De Gregorio* v. *United States*, 7 F. 2d 295 (C.A. 2); *United States* v. *Antonelli Fireworks Co.*, 155 F. 2d 631 (C.A. 2), certiorari denied, 329 U.S. 742. Moreover, Hill was present and available to the defense. Where a witness is available to both sides no unfavorable inference may be drawn against either party from the failure to call him. *United States* v. *Antonelli Fireworks Co.*, *supra*.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1958.

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